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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
13 (HONORABLE M. JAMES LORENZ)

14 UNITED STATES OF AMERICA,) CASE NO.: 08CR01002-L
15 Plaintiff,)
16 v.) STATEMENT OF FACTS AND
17) MEMORANDUM OF POINTS AND
18) AUTHORITIES IN SUPPORT OF MOTIONS
19)
20)
21)
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23)
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25)
26)
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28)
FRANKLIN ANTONIO FIGUEROA-)
MONTES,)
Defendant.)
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I.

STATEMENT OF FACTS

On April 2, 2008, a one count indictment was handed down by the January 2007 grand jury charging Mr. Figueroa-Montes with being a deported alien found in the United States, in violation of 8 U.S.C. § 1326.

II.

MOTION TO COMPEL DISCOVERY AND PRESERVE EVIDENCE

Mr. Figueroa-Montes moves for production of the following discovery. This request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any “closely related investigative [or other] agencies.” See United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989). Specifically, Mr. Figueroa-Montes moves for the production of the following evidence:

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1 1. **Mr. Figueroa-Montes's Statements.** Mr. Figueroa-Montes requests the government disclose
 2 any and all written, recorded and oral statements made by him, as well any written summaries of his oral
 3 statements contained in the handwritten notes of any Government agent. Fed. R. Crim. P. 16(a)(1)(A). The
 4 Advisory Committee Notes and the 1991 amendments to Rule 16 make clear that the Government must
 5 reveal all of Mr. Figueroa-Montes's statements, whether written or oral, regardless of whether the
 6 Government intends to make any use of those statements. **Pursuant to Fed. R. Crim. P. 16(a)(1)(B)(i), Mr.**
 7 **Figueroa-Montes requests copies of the audio tapes of any taped telephone call made while he was or**
 8 **is in custody.**

9 2. **Arrest Reports, Notes and Dispatch Tapes.** Mr. Figueroa-Montes requests the Government
 10 to turn over all arrest reports, notes, dispatch or any other tapes and records that relate to the circumstances
 11 surrounding his arrest or any questioning. This request includes, but is not limited to, any rough notes,
 12 records, reports, transcripts or other documents in which statements of Mr. Figueroa-Montes or any other
 13 discoverable material is contained. Such material is discoverable under Fed. R. Crim. P. 16(a)(1)(A) and
 14 Brady v. Maryland, 373 U.S. 83 (1963). The Government must produce arrest reports, investigator's notes,
 15 memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to Mr.
 16 Figueroa-Montes. See Fed. R. Crim. P. 16(a)(1)(B) and (c), Fed. R. Crim. P. 26.2. **Specifically, Mr.**
 17 **Figueroa-Montes requests copies of any Report of Investigation ("ROI") or Record of**
 18 **Deportable/Inadmissible Alien ("I-213") written in his case.**

19 3. **Mr. Figueroa-Montes's "A-File."** Mr. Figueroa-Montes requests the Court enter an order
 20 giving him the opportunity for his attorney and/or a defense investigator to inspect and copy the
 21 entire contents of his immigration "A-File" at a time mutually convenient to both parties. A proposed
 22 will be sent via electronic mail to Chambers as well as to the Assistant United States Attorney.

23 4. **Brady Material.** Mr. Figueroa-Montes requests all documents, statements, agents' reports, and
 24 tangible evidence favorable to Mr. Figueroa-Montes on the issue of guilt and/or which affects the credibility
 25 of the Government's witnesses and the Government's case. Under Brady, impeachment as well as
 26 exculpatory evidence falls within the definition of evidence favorable to the accused. United States v.
 27 Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976). Further, Brady requires the

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1 government disclose any information that may result in a lower sentence under the sentencing guidelines,
2 notwithstanding its advisory nature, because it is exculpatory and/or mitigating evidence.

3 5. **Mr. Figueroa-Montes's Prior Record.** Mr. Figueroa-Montes requests disclosure of his prior
4 criminal record. Fed. R. Crim. P. 16(a)(1)(B).

5 6. **Any Proposed 404(b) Evidence.** Evidence of prior similar acts is discoverable under Fed. R.
6 Crim. P. 16(a)(1)(c) and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon
7 request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the
8 general nature . . ." of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at
9 trial. Mr. Figueroa-Montes requests the government "articulate precisely the evidential hypothesis by which
10 a fact of consequence may be inferred from the other acts evidence." United States v. Mehrmanesh, 689 F.2d
11 822, 830 (9th Cir. 1982) (emphasis added; internal citations omitted); see also United States v. Brooke, 4
12 F.3d 1480, 1483 (9th Cir. 1993) (reaffirming Mehrmanesh and reversing convictions). Mr. Figueroa-Montes
13 requests **three weeks notice before trial** to give the defense time to adequately investigate and prepare for
14 trial.

15 7. **Evidence Seized.** Mr. Figueroa-Montes requests production of evidence seized as a result of any
16 search, either warrantless or with a warrant. Fed. R. Crim. P. 16(a)(1)(c).

17 8. **Request for Preservation of Evidence.** Mr. Figueroa-Montes specifically requests the
18 preservation of all physical evidence that may be destroyed, lost, or otherwise put out of the possession,
19 custody, or care of the Government and which relates to the arrest or the events leading to the arrest in this
20 case. This request includes, but is not limited to, the results of any fingerprint analysis, Mr. Figueroa-
21 Montes's personal effects, and any evidence seized from Mr. Figueroa-Montes.

22 9. **Tangible Objects.** Mr. Figueroa-Montes requests the opportunity to inspect, copy, and test, as
23 necessary, all other documents and tangible objects, including photographs, books, papers, documents,
24 fingerprint analyses, or copies of portions thereof, which are material to the defense, intended for use in the
25 Government's case-in-chief, or were obtained from or belong to Mr. Figueroa-Montes. Fed. R. Crim. P.
26 16(a)(1)(c). **Specifically, Mr. Figueroa-Montes requests copies of the audio tapes of his alleged prior
27 deportations or removals.**

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1 10. **Expert Witnesses.** Mr. Figueroa-Montes requests the name, qualifications, and a written
2 summary of the testimony of any person that the Government intends to call as an expert witness during its
3 case in chief. Fed. R. Crim. P. 16(a)(1)(E). The defense requests the notice of expert testimony be provided
4 a minimum of two weeks prior to trial so the defense can properly prepare to address and respond to this
5 testimony, including obtaining its own expert and/or investigating the opinions, credentials of the
6 Government's expert and a hearing in advance of trial to determine the admissibility of qualifications of any
7 expert. See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (trial judge is "gatekeeper" and
8 must determine, reliability and relevancy of expert testimony and such determinations may require "special
9 briefing or other proceedings").

10 11. **Scientific and Other Information.** Mr. Figueroa-Montes requests the results of any scientific
11 or other tests or examinations conducted by any Government agency or their subcontractors in connection
12 with this case. See Fed. R. Crim. P. 16(a)(1)(D).

13 12. **Henthorn Material.** Mr. Figueroa-Montes requests that the Assistant United States Attorney
14 ("AUSA") assigned to this case oversee (not personally conduct) a review of all personnel files of each agent
15 involved in the present case for impeachment material. See Kyles v. Whitley, 514 U.S. 419 (1995) (holding
16 that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on
17 the Government's behalf in the case, including the police"); United States v. Henthorn, 931 F.2d 29 (9th Cir.
18 1991); United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992) (AUSA may not be ordered to personally
19 conduct examination of records; appropriate Government agency may review files and notify AUSA of
20 contents as long as AUSA makes the determination regarding material to be disclosed); United States v.
21 Herring, 83 F.3d 1120 (9th Cir. 1996) (accord).

22 13. **Evidence of Bias or Motive to Lie.** Mr. Figueroa-Montes requests any evidence that any
23 prospective Government witness is biased or prejudiced against Mr. Figueroa-Montes, or has a motive to
24 falsify or distort his or her testimony.

25 14. **Impeachment Evidence.** Mr. Figueroa-Montes requests any evidence that any prospective
26 Government witness has engaged in any criminal act whether or not resulting in a conviction and whether
27 any witness has made a statement favorable to Mr. Figueroa-Montes. See Fed. R. Evid. 608, 609 and 613;
28 Brady v. Maryland, 373 U.S. 83 (1963).

1 15. **Evidence of Criminal Investigation of Any Government Witness.** Mr. Figueroa-Montes
2 requests any evidence that any prospective witness is under investigation by federal, state or local authorities
3 for any criminal conduct.

4 16. **Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling.**
5 Mr. Figueroa-Montes requests any evidence, including any medical or psychiatric report or evaluation, that
6 tends to show that any prospective witness' ability to perceive, remember, communicate, or tell the truth is
7 impaired, and any evidence that a witness has ever used narcotics or other controlled substances, or has ever
8 been an alcoholic.

9 17. **Witness Addresses.** Mr. Figueroa-Montes requests the name and last known address of each
10 prospective Government witness. Mr. Figueroa-Montes also requests the name and last known address of
11 every witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who
12 will not be called as a Government witness.

13 18. **Name of Witnesses Favorable to Mr. Figueroa-Montes.** Mr. Figueroa-Montes requests the
14 name of any witness who made an arguably favorable statement concerning Mr. Figueroa-Montes or who
15 could not identify him or who was unsure of his identity, or participation in the crime charged.

16 19. **Statements Relevant to the Defense.** Mr. Figueroa-Montes requests disclosure of any
17 statement relevant to any possible defense or contention that he might assert in his defense.

18 20. **Giglio Information & Agreements Between the Government and Witnesses.** Pursuant to
19 Giglio v. United States, 405 U.S. 150 (1972), Mr. Figueroa-Montes requests all statements and/or promises,
20 express or implied, made to any witness, in exchange for their testimony in this case, and all other
21 information which could be used for impeachment. Mr. Figueroa-Montes also requests discovery regarding
22 any other express or implicit promise, understanding, offer of immunity, of past, present, or future
23 compensation, or any other kind of agreement, promise, or understanding, including any implicit
24 understanding relating to criminal or civil income tax, forfeiture or fine liability, between any prospective
25 Government witness and the Government (federal, state and/or local). This request also includes any
26 discussion with a potential witness about or advice concerning any contemplated prosecution, or any
27 possible plea bargain, even if no bargain was made, or the advice not followed, and specifically includes any
28 discussion with a potential witness regarding that witness' immigration status and/or any affect that the

1 witness' statements or lack thereof might have on that status, including the granting or revoking of such
2 immigration status or any other immigration status, including but not limited to citizenship, nationality, a
3 green card, border crossing card, parole letter, or permission to remain in the United States.

4 21. **Informants and Cooperating Witnesses.** Mr. Figueroa-Montes requests disclosure of the
5 names and addresses of all informants or cooperating witnesses used or to be used in this case, and in
6 particular, disclosure of any informant who was a percipient witness in this case or otherwise participated
7 in the crime charged against Mr. Figueroa-Montes. The Government must disclose the informant's identity
8 and location, as well as the existence of any other percipient witness unknown or unknowable to the defense.
9 Roviaro v. United States, 353 U.S. 53, 61-62 (1957). The Government must disclose any information
10 derived from informants which exculpates or tends to exculpate Mr. Figueroa-Montes. Brady v. Maryland,
11 373 U.S. 83 (1963)

12 22. **Bias by Informants or Cooperating Witnesses.** Mr. Figueroa-Montes requests disclosure of
13 any information indicating bias on the part of any informant or cooperating witness. Giglio v. United States,
14 405 U.S. 150 (1972). Such information includes, but is not limited to, any inducements, favors, payments
15 or threats that were made to the witness in order to secure cooperation with the authorities.

16 23. **Jencks Act Material.** Mr. Figueroa-Montes requests production in advance of trial of all
17 material, including dispatch tapes, which the Government must produce pursuant to the Jencks Act, 18
18 U.S.C. § 3500. Advance production will avoid the possibility of delay at trial to allow Mr. Figueroa-Montes
19 to investigate the Jencks material. A verbal acknowledgment that "rough" notes constitute an accurate
20 account of the witness' interview is sufficient for the report or notes to qualify as a statement under §
21 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963); see United States v. Boshell, 952 F.2d
22 1101 (9th Cir. 1991) (agent's interview notes reviewed with interviewee subject to Jencks Act).

23 24. **Residual Request.** Mr. Figueroa-Montes intends by this discovery motion to invoke his rights
24 to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the
25 Constitution and laws of the United States. Mr. Figueroa-Montes requests that the Government provide him
26 and his attorney with the above requested material sufficiently in advance of trial to avoid unnecessary delay
27 prior to cross-examination.

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III.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

3 **Defense counsel has received 119 pages of discovery in this case.** As more information comes to
4 light, due to the Government providing additional discovery in response to these motions or an order of this
5 Court, the defense may find it necessary to file further motions. It is, therefore, requested that defense
6 counsel be allowed the opportunity to file further motions based upon information gained through the
7 discovery process. **Specifically, defense counsel has not yet had an opportunity to examine Mr.**
8 **Figueroa-Montes' immigration A-file yet. After examining his A-file, Mr. Figueroa-Montes anticipates**
9 **he may file a motion to attack any alleged deportations. Mr. Figueroa-Montes thus requests an**
10 **opportunity to file further motions upon review of his A-file.**

IV.

CONCLUSION

13 For the foregoing reasons, Mr. Figueroa-Montes respectfully requests that the Court grant the above
14 motions.

Respectfully submitted,

Dated: April 11, 2008

s/ *Hanni M. Fakhoury*
HANNI M. FAKHOURY

Federal Defenders of San Diego, Inc.
Attorneys for Mr. Figueroa-Montes